

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
FILED Roanoke
JUN 13 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOHN F. CORCORAN, CLERK
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FREEMAN A. JONES,
Petitioner,) Civil Action No. 7:07-cv-00169
)
)
v.) MEMORANDUM OPINION
)
)
WARDEN OF GREENSVILLE)
CORRECTIONAL CENTER,) By: Hon. Norman K. Moon
Respondent.) United States District Judge

Freeman A. Jones, a Virginia inmate proceeding pro se, filed this action as a motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255. However, upon review of his motion, the court determined that Jones is in state custody and is actually challenging the execution of his state sentence. Therefore, the court construed his motion as a writ of habeas corpus, pursuant to 28 U. S. C. § 2254. The court finds that Jones has failed to exhaust his available state court remedies and, therefore, dismisses his petition without prejudice.

I.

On November 29, 1999, Jones was convicted on two drug distribution charges by the Circuit Court of Louisa County, Virginia. He was sentenced to a total of twenty years incarceration (ten years for each charge) with eighteen years suspended (nine years for each charge), to be followed by a term of supervised probation. While on probation, a federal grand jury in the Western District of Virginia returned an indictment, charging Jones with conspiring to distribute 50 grams or more of a substance containing crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). The Virginia Department of Corrections took Jones into custody for violating the conditions of his probation. Thereafter, appearing before this court by writ of habeas corpus ad prosequendum, Jones pled guilty to the conspiracy charge on August 8, 2005. On March 23, 2006, this court sentenced Jones to 131 months incarceration, followed by ten years of supervised release. Then, on May 8, 2006, the Circuit Court of

Louisa County, Virginia found Jones guilty of violating his parole, revoked his suspended sentence, and reimposed his two 9-year sentences. The state court ordered that the two 9- year sentences run concurrent with each other and with the 131 months imposed by this court. Jones was then released to Virginia state custody.

While Jones is in state custody, his state sentence is running; however, his federal sentence is not. In his motion, Jones requests that he be transferred to federal custody so that his federal sentence can begin to run. Jones does not challenge the legality of his federal conviction. Rather, he argues that the execution of his state sentence is improper as it is supposed to run concurrent to his federal sentence but cannot until he is actually in federal custody.

By affidavit, Jones concedes that he has not filed a direct appeal from his state court conviction and that he has a state habeas petition currently pending in the Circuit Court of Louisa County.

II.

A federal court cannot grant a habeas petition unless the petitioner has exhausted the remedies available in the courts of the state in which he was convicted. Preiser v. Rodriguez, 411 U.S. 475 (1973). If the petitioner has failed to exhaust state court remedies, the federal court must dismiss the petition. Slayton v. Smith, 404 U.S. 53 (1971). In Virginia, a non-death row felon ultimately must present his claim to the Supreme Court of Virginia and receive a ruling from that court, before a federal district court may consider his claims. See Va. Code §8.01-654. As Jones' did not file a direct appeal, and his state habeas corpus petition in the Circuit Court of Lousia County, the court finds that Jones' claim is unexhausted in the state courts.

III.

For the reasons stated, the court dismisses Jones' petition without prejudice as unexhausted.

The Clerk is directed to send a certified copy of this Memorandum Opinion and accompanying Order to the petitioner.

ENTER: This 13th day of June, 2007.


United States District Judge